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No. 79-1985

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROGER A. JOURDAIN AND MARGARET E. JOURDAIN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The sole question presented in this federal income tax case is whether petitioner's[1] salary, earned as Chairman of the Tribal Council of the Red Lake Band of Chippewa Indians, is exempt from tax, on the authority of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (Pet. App. A-21 to A-27).

The pertinent facts are undisputed and may be summarized as follows: During the taxable years at issue, the funds used to pay petitioner's salary as Chairman of the Tribal Council were derived from a trust fund held by

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[1]Margaret E. Jourdain is a party to this action solely because she filed joint returns with her husband for 1971 and 1972. "Petitioner" refers solely to Roger A. Jourdain.

the United States Government for the benefit of the Red Lake Band of Chippewa Indians. This trust fund consisted of tribal receipts from royalties, leases, and other sources, together with the interest earned on such funds. Distributions were made to the Tribe by the Department of the Interior, Bureau of Indian Affairs, in response to the Tribal Council's quarterly budget request, which specified the amount the Tribe needed for its salary and other administrative expenses (Pet. App. A-2, A-10 to A-11). Although petitioner was issued a land-use permit for a homesite and garden on the reservation, he has never been the recipient of an "allotment" as that term is used in the General Allotment Act of 1887 (Pet. App. A-3, A-9 to A-10). The Tribe's revised constitution and bylaws, in fact, prohibited the allotment of its land (Pet. App. A-3, A-9).

On audit, the Commissioner of Internal Revenue determined that petitioner's salary was subject to federal income tax. Petitioner thereupon brought this suit in the Tax Court for redetermination of the resulting deficiencies. In a reviewed decision, the Tax Court held that petitioner's salary was not exempt (Pet. App. A-5 to A-20). In so ruling, the Tax Court noted that the reservation land was not allotted to individual Indians and that, in any event, petitioner's wages were not "directly derived" from the land (Pet. App. A-17). The court of appeals affirmed (Pet. App. A-1 to A-4).

1. The decision below correctly held that petitioner's salary was subject to tax. Like all other citizens, Indians are subject to federal income taxation unless exempt by statute or treaty. *Superintendent* v. *Commissioner*, 295 U.S. 418, 421 (1935). The treaties and Acts of Congress pertinent to petitioner's claim are typical of those under which the government agrees to hold title to reservation land in trust for the members of a tribe and which confer certain tax exemptions relating to the lands.

As this Court observed in *Squire* v. *Capoeman*, 351 U.S. 1, 9 (1956), " 'It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom,' " quoting from F. Cohen, *Handbook of Federal Indian Law* 265 (1941). Whether income is directly derived from land or from some other source is essentially a question of fact. Where the income derives from the production, severance, or extraction of the land's natural resources, the land is the fundamental and direct source of income so that the income is exempt. See, *e.g.*, *Squire* v. *Capoeman*, *supra* (sale of timber); *Big Eagle* v. *United States*, 300 F. 2d 765 (Ct. Cl. 1962) (production of minerals). On the other hand, the courts have uniformly held that the exemption is not available simply because in some indirect or minor way the income is related to tax-exempt land. See, *e.g.*, *Commissioner* v. *Walker*, 326 F. 2d 261 (9th Cir. 1964) (tribal official's salary paid out of revenues derived from land); *Fry* v. *United States*, 557 F. 2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (payments to Indian logger who worked on reservation land); *Holt* v. *Commissioner*, 364 F. 2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967) (profits received from ranching activities conducted on tribal land); *Critzer* v. *United States*, 597 F. 2d 708 (Ct. Cl.), cert. denied, No. 79-86 (Oct. 16, 1979) (profits derived from operation of a restaurant, motel and gift shop located on tribal land); *Beams* v. *United States*, 294 F. Supp. 1218 (E.D. Okla. 1968), aff'd per curiam, 417 F. 2d 197 (10th Cir. 1969) (income derived from the reinvestment of royalties).

Here, the record amply supports the conclusion of both courts below that petitioner's salary was not derived from tax-exempt land. To the contrary, petitioner received the income in question solely as compensation for his personal services as Chairman of his Tribal Council.

Accordingly, it is taxable to him regardless of its ultimate source. Section 61(a) of the Internal Revenue Code of 1954 (26 U.S.C.); *Commissioner* v. *Walker*, *supra*, 326 F. 2d at 261. See also *Choteau* v. *Burnet*, 283 U.S. 691, 694 (1931).[2]

2. Contrary to petitioner's argument (Pet. 6, 10), the decision below does not conflict with *Squire* v. *Capoeman*, *supra*. In *Squire*, the Court held that proceeds from the sale of timber cut from allotted lands were exempt from federal income tax. But as subsequent decisions have made clear, the rule of *Squire* does not apply to *un*allotted tribal land as involved in this case. See *Holt* v. *Commissioner*, *supra*, 364 F. 2d at 40-41; *Fry* v. *United States*, *supra*, 557 F. 2d at 649. Compare *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935).[3] In any event, as previously noted, *Squire* does not exempt from taxation payments from the

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[2]Petitioner argues (Pet. 8-9) that *Walker*, *Fry* and *Holt* are distinguishable because they did not involve income from unallotted land held in trust by the government pursuant to an Act of Congress. But those cases stand for the proposition that the General Allottment Act does not apply unless reservation land is, in fact, allotted to individual Indians. The mere fact that the Red Lake Band of Chippewa Indians may have taken certain preliminary (and ultimately unsuccessful) steps toward that end in 1889 does not trigger the Act's operation in the absence of a formal allotment. And without such an allotment, there can be no exemption.

[3]Contrary to petitioner's claim (Pet. 9), the distinction between allotted and unallotted lands is significant. The General Allotment Act required the government to deliver a fee interest in tribal land to an Indian allottee (when he was judged competent) "free of all charge or incumbrance whatsoever" (Pet. App. A-22). Thus, the purpose of the allotment system was to provide Indians with unencumbered land on which they could achieve self-sufficiency. For that reason, this Court held in *Squire* v. *Capoeman*, *supra*, that income derived directly from allotted land could not be taxed. Here, in the absence of any allotted land, there is no reason to exempt petitioner from taxes that are imposed on all other citizens. See *Board of Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943).

tax-exempt funds to an individual, for personal services not directly related to deriving the income from tax-exempt lands.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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